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No. 91-1330

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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ERNEST FRANZ COMBS, JR., AND
PATRICIA ANN HAYES, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court should have held an evidentiary hearing before rejecting petitioners' claim that the government made improper use of petitioner Combs' immunized testimony.

2. Whether Drug Enforcement Administration agents violated petitioners' Fourth Amendment rights by assisting Spanish law enforcement officials in translating telephone conversations that were lawfully intercepted in Spain under Spanish law.

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### OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unreported, but the judgment is noted at 946 F.2d 903 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on September 9, 1991. A petition for rehearing was denied on November 15, 1991. The petition for a writ of certiorari was filed on February 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After separate jury trials in the United States District Court for the Southern District of Florida, petitioners were each convicted of participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and conspiring to import and distribute hashish from February 1985 through August 1, 1986, in violation of 21 U.S.C. 963. In addition, petitioner Combs was convicted of conspiring to import and distribute hashish from December 1983 through December 12, 1984, in violation of 21 U.S.C. 963. Combs was sentenced to 40 years' imprisonment and fined $50,000. Hayes was sentenced to eight years' imprisonment, to be followed by a five-year term of probation, and fined $10,000. The court of appeals affirmed without opinion. Pet. App. A1.

1. The evidence at trial showed that in the early 1970s petitioner Combs headed an organization that smuggled hashish and marijuana into the United States from Germany, Switzerland, the Netherlands, Afghanistan, India, and Pakistan. Beginning in late 1972, Combs and his associates imported Lebanese hashish into Los Angeles and Las Vegas in prefabricated speaker cabinets. In 1973, Combs and his associates imported 400 pounds of hashish hidden inside a crane boom. In 1974 or 1975, Combs had a load of oceanographic buoys filled with Thai marijuana shipped from Alaska to San Francisco. On three occasions from 1976 to late 1977, the Combs enterprise successfully imported 3,000 pounds of Thai marijuana. Gov't C.A. Br. 11-16.

In 1984, the dead body of Frederick Hilliard was discovered. Because Hilliard was working for a

naval contractor in Alameda, California, and had surveillance equipment and $36,371 in cash in his possession when he died, the Naval Investigative Service opened an investigation. That inquiry uncovered naval messages concerning two shipments of aircraft parts from Pakistan to the Naval Air facility in Alameda. Government agents seized the second shipment, which was found to consist of crates containing 4008 pounds of hashish. Investigators learned that the crates had been shipped from Pakistan by Howard Marks. Later, it was determined that Combs, Hilliard, and others participated in the operation. In 1985, Wyvonna Meyers picked up $60,000 to $70,000 from petitioners and delivered it to Marks in London. Gov't C.A. Br. 17-18.

In December 1985, based on a tip from a confidential informant, Spanish law enforcement authorities obtained a wiretap for telephones in Marks' residence in Palma, Spain. Some of the intercepted calls involved conversations between petitioners and Marks relating to drugs. Because the conversations were in English and used code words, the Spanish authorities asked the U.S. Drug Enforcement Administration for assistance. A DEA agent provided assistance in interpreting the tapes. As a result of that assistance, the DEA learned that Combs was involved in drug importation schemes and was staying at the Beverly Pavilion Hotel in Beverly Hills. In April 1986, following surveillance of Combs' activities, agents arrested Combs and searched his hotel room, finding $43,000 in cash and more than 500 grams of hashish. After Combs' arrest, petitioner Hayes assumed responsibility for collecting money from the importation scheme. Gov't C.A. Br. 18-21.

In 1987, Combs testified before a federal grand jury sitting in the Northern District of California.

In connection with Combs' appearance, the government agreed not to use his immunized testimony against him or against Hayes, his common-law spouse. Gov't C.A. Sealed Br. 1-2.[1]

2. On July 12, 1988, the instant indictment against petitioners was returned in the Southern District of Florida. Before trial, petitioners moved to dismiss the indictment, alleging that the government had made improper use of Combs' immunized testimony, and that the court should hold a hearing on that issue under *Kastigar* v. *United States*, 406 U.S. 441 (1972). In opposing that motion, the government represented that "the evidence against [petitioners] had been accumulated well before December 1987." Gov't Opposition to Defendant's Motion To File Under Seal and To Dismiss at 5, *United States* v. *Combs*, No. 88-469-Cr-PAINE(S) (S.D. Fla. Nov. 16, 1988).[2] The government also represented that the prosecutor in charge of this case had not been aware of Combs' cooperation in the unrelated California investigation until early 1988, and that the prosecutor did not possess information from Combs' grand jury appearance. Although the government did not trace particular items of evidence against petitioners to specific independent sources, the government offered to substantiate its contention at a hearing if the district court desired. *Id.* at 6. The court denied the motion to dismiss without an evidentiary hearing. It

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[1] At oral argument in the court of appeals, the court ordered the sealed filings in this case to be unsealed. See Pet. 4 n.2.

[2] The opposition explained the origins of the investigation in January 1986, with the DEA's assistance to Spanish law enforcement officials, and the further investigation by the DEA that led to Combs' arrest. Gov't Opposition, at 3-4, *supra*.

also denied petitioners' motion for reconsideration of that order. Gov't C.A. Sealed Br. 3-4.[3]

Following the guilty verdicts, petitioners renewed their claim that the government had made improper use of Combs' immunized testimony and again requested an evidentiary hearing. After reviewing the pleadings and the trial record, the district court denied that motion. The court stated that "the record of this cause sufficiently shows that the evidence produced by the government in the trial of the defendant was obtained independently of information which may have been received by other prosecutorial authorities in the government in connection with a different investigation." Order at 2 (June 21, 1989); Sealed Gov't C.A. Br. 2-4.

3. Prior to trial, petitioners also moved to suppress the evidence obtained from the Spanish wiretap. After an evidentiary hearing, the district court denied the motion. The evidence adduced at the hearing showed that Spanish law enforcement officers initiated an investigation of Marks based on a tip from a confidential informant. Thereafter, based on a factual showing of need for the wiretap, they obtained authority from a Spanish judge to conduct electronic surveillance of telephone lines at Marks' residence. The initial one-month authorization was

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[3] The court denied the motion for reconsideration after hearing testimony in connection with petitioners' motion to suppress evidence. That testimony indicated, *inter alia*, that (a) the Spanish wiretap, which was the source of all of the government's tape-recorded conversations involving petitioners, had ended in July 1986, and (b) the arrest of petitioner on April 9, 1986, and the seizure of hashish and money from him, resulted from surveillance and a search warrant. Gov't C.A. Sealed Br. 4 n.4.

extended each month until the Spanish police no longer had an interest in the investigation. Gov't C.A. Br. 4.

Because the intercepted conversations contained a considerable amount of jargon that the Spanish interpreter did not understand, the Spanish police requested assistance from the DEA. The DEA assigned Agent Craig Lovato of its Madrid office to assist the Spanish officials in interpreting the intercepted conversations. A Spanish police officer worked with Lovato. Lovato listened to all of the conversations, but copied only those relevant to drug trafficking. If a conversation was not drug related, Lovato would not listen to the entire conversation. Lovato's role was limited to translating the conversations; Spanish officials conducted the surveillance without assistance from DEA. Gov't C.A. Br. 5-6.

Eventually, Lovato realized that the intercepted conversations concerned a shipment of hashish to the United States, and he relayed that information to DEA's domestic and foreign offices. He also contacted agencies in various parts of the world seeking corroboration of evidence obtained from the surveillance. After translating the first four tapes, Lovato returned to Madrid and told his superiors that Marks appeared to be a significant trafficker. Nevertheless, the DEA decided against assigning an agent to Palma to continue translating the tapes on a daily basis. Instead, it was agreed that the Spanish police would deliver the tapes for translation to the DEA in Madrid. That arrangement did not prove effective, however, so the DEA assigned Agent Phil Needham to Palma for two weeks. Needham translated the intercepted conversations and discussed the calls with Lovato, who assisted in identifying the voices. The DEA assigned Lovato to Palma on a full-time basis after Needham returned to the United States. Gov't C.A. Br. 6-8.

4. On appeal, petitioners argued that the government had impermissibly used Combs' immunized testimony and that the district court should have suppressed the Spanish wiretap evidence. The court of appeals rejected both claims and affirmed petitioners' convictions without opinion. Pet. App. A1.

## ARGUMENT

1. Petitioners contend (Pet. 8-10) that the government did not adequately establish that Combs' immunized testimony was not used against him and that the district court should have required the government to provide evidentiary support for its position.

This Court has held that the government bears the burden of establishing that testimony a defendant gives under a promise of use immunity is not directly or indirectly used in a subsequent prosecution against that defendant. *Kastigar* v. *United States*, 406 U.S. at 460. To meet that burden, the government must show by a preponderance of the evidence that its evidence in the subsequent prosecution was derived from a legitimate independent source. *Ibid.* Although *Kastigar* motions generally are resolved following adversary evidentiary hearings, a hearing is not required in every case; rather, the decision whether to grant a hearing lies within the discretion of the trial court. See *United States* v. *Dynaelectric Co.*, 859 F.2d 1559, 1580 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989); *United States* v. *Byrd*, 765 F.2d 1524, 1529 (11th Cir. 1985); *United States* v. *Provenzano*, 620 F.2d 985, 1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980).

In this case, the district court did not conduct a hearing before denying petitioners' pretrial *Kastigar* motion. The issue of whether the court erred in so doing, however, is now moot. In response to peti-

tioners' post-trial renewal of that motion, the district court reconsidered their claim in light of the evidence adduced at trial, and the court concluded that the trial evidence sufficiently demonstrated that all the government's evidence against them was obtained independently of the immunized testimony. In these circumstances, where the trial evidence satisfies the court that the government did not make any use of immunized testimony, a separate evidentiary hearing would be superfluous. See *Provenzano*, 620 F.2d at 1006 (no *Kastigar* hearing required in light of documents submitted by the government "conclusively demonstrat[ing] prior knowledge").

Further, drawing on the evidence at trial, the government's filings on appeal demonstrated the existence of independent sources for each of the offenses addressed in Combs' immunized testimony. Gov't C.A. Sealed Br. 5-7. Both courts below, therefore, have determined that the government established independent sources for its evidence against petitioners. The concurrent factual determination of those courts does not warrant this Court's review. See *United States* v. *Doe*, 465 U.S. 605, 614 (1984) ("Traditionally, we * * * have been reluctant to disturb findings of fact in which two courts below have concurred.").

In the face of the lower court rulings, petitioners cite only a single item of evidence that they claim was a product of the alleged *Kastigar* violation—the testimony of cooperating witness Robert Stephenson implicating Combs in the Alameda shipment of hashish. Pet. 9.[4] The trial evidence did not reveal the

[4] Petitioner Combs discussed that shipment in his immunized testimony, but he makes no claim (Pet. 9-10) that he identified Stephenson or linked him to that shipment.

government's source for Stephenson or his testimony. Nor did the government specifically address that issue in written submissions in the courts below.[5] In the oral argument before the court of appeals, however, the government did address Stephenson's testimony, explaining that the government had learned of Stephenson's role in the Alameda operation a full two years before Combs gave his immunized testimony, and that, during the intervening period, the government had developed a very strong case against Stephenson. The government also raised the possibility of a remand to the district court for the purpose of allowing the government to set forth on the record its independent source for Stephenson's testimony. The court

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[5] That may be due to the manner in which the issue was briefed in those courts. Petitioners did not refer to Stephenson in their pretrial filings, nor in their initial post-trial motion to vacate. The first reference to Stephenson appeared *after* the government had filed its response to the post-trial motions. In Defendants' Supplement To Motion To Vacate Judgment, at 9, No. 88-0469-CR-PAINE (June 9, 1989), petitioners stated that "it also became known to various subjects of this investigation that Mr. Combs had in fact cooperated with the government," and gave as an "illustration of this" that Stephenson "was somehow made aware of Combs' cooperation" before being subpoenaed to testify before the grand jury. The factual basis for that claim was contained in an attached declaration of Combs' counsel, which stated that he was informed by Hayes' counsel "that on June 8, 1989, [Hayes' counsel] was informed by Dale Drozd, attorney for witness Robert Stephenson, that prior to his Grand Jury and trial testimony in the instant case, Mr. Stephenson and others were aware that defendant Combs had previously cooperated with the government." Att. to Defendants' Supplement, *supra*. On appeal, petitioners' opening brief devoted a page and a half to the *Kastigar* issue and did not mention Stephenson, whose testimony was first discussed in the reply brief. Pet. C.A. Br. 37-39; Pet. C.A. Reply Br. 9-10.

of appeals affirmed without requiring a remand on that point.

In our view, further proceedings on petitioners' *Kastigar* claim are not necessary. The district court's review of the trial record provides a sufficient basis for rejecting the bulk of petitioners' generalized claims of taint. As to petitioners' only specific claim, the government informed the court of appeals that it had an independent source for Stephenson's testimony, and in light of the information before it, the court of appeals did not believe a remand was necessary. There is no cause for this Court to disturb that discretionary ruling. If, however, this Court believes that it would be appropriate for the government to present evidence before a trier of fact to establish that Stephenson's testimony was not tainted through exploitation of Combs' immunized submissions, we would have no objection to a remand to the district court for that limited purpose.

2. Petitioners contend (Pet. 11-13) that the interception of their telephone conversations with Marks violated their Fourth Amendment rights. They acknowledge that the Fourth Amendment does not govern searches conducted by foreign law enforcement officers in their own countries, even if the targets are American. See *United States* v. *Rosenthal*, 793 F.2d 1214, 1230, modified, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Rose*, 570 F.2d 1358, 1361 (9th Cir. 1978). They argue, however, that that rule does not apply here because the interception of Marks' telephone conversations in Spain was "a joint venture between DEA and the Spanish police" (Pet. 11).[6]

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[6] Petitioners also suggest (Pet. 12-13 nn.5 & 6) that the wiretap evidence should have been excluded under Title III

Some courts have recognized an exception to the rule that the Fourth Amendment does not apply to searches conducted abroad by foreign officials when "Federal agents so substantially participate[] in the [search] so as to convert [it] into [a] joint venture[] between the United States and the foreign officials." *Stonehill* v. *United States*, 405 F.2d 738, 743 (1968), cert. denied, 395 U.S. 960 (1969). See also *Rosenthal*, 793 F.2d at 1231; *United States* v. *Hensel*, 699 F.2d 18, 25 (1st Cir.), cert. denied, 461 U.S. 958 (1983); *United States* v. *Callaway*, 446 F.2d 753, 755 (3d Cir. 1971), cert. denied, 404 U.S. 1021 (1972). But here the electronic surveillance was not a joint venture.

Spain initiated the wiretap of Marks without any request from the DEA, and the wiretap was conducted entirely by Spanish officials. The DEA's sole role, undertaken at the request of Spanish police, was to interpret the conversations obtained pursuant to the wiretap. Spanish authorities controlled the surveillance from start to finish, including the decision when to terminate it. Indeed, the Spanish head of the operation testified that any attempt by DEA to impose American legal standards on the Spanish would have been rejected. Gov't C.A. Br. 28. In these circumstances, the fact that DEA used the resulting information to initiate an investigation in the United States did not raise DEA's involvement to the level

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of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Title III, however, has no extraterritorial force. See *United States* v. *Peterson*, 812 F.2d 486, 492 (9th Cir. 1987); *Stowe* v. *Devoy*, 588 F.2d 336, 341 n.12 (2d Cir. 1978), cert. denied, 442 U.S. 931 (1979); *United States* v. *Cotroni*, 527 F.2d 708, 711 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976).

of a joint venture. Cf. *Kilday* v. *United States*, 481 F.2d 655, 656 (5th Cir. 1973) (upholding admission of evidence obtained during interrogations conducted by foreign officials, with American officials acting as interpreters, despite fact that *Miranda* warnings were not given); *Birdsell* v. *United States*, 346 F.2d 775 (5th Cir.), cert. denied, 382 U.S. 963 (1965) (upholding admission of evidence seized during a search by Mexican officials, with American law enforcement officer acting as interpreter).[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992

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[7] In any event, a foreign search jointly carried out by the foreign country and the United States in compliance with foreign law should not be regarded as unreasonable under the Fourth Amendment where, as in the case of Spain, the applicable foreign law requires judicial authorization to search based on an adequate showing of need. See *United States* v. *Peterson*, 812 F.2d at 490.

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